APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERN GEORGE DAVIDSON,)
Appellant,)
vs.) No. 14,356
UNITED STATES OF AMERICA,)
Appellee.)

Dec. 27, 1954

Appeal from the United States District Court for the Southern District of California, Central Division.

Before MATHEWS and ORR, Circuit Judges, and WIIG, District Judge.

WIIG, District Judge.

Davidson was charged and convicted of the offense of knowingly refusing to submit to induction under the Universal Military Training and Service Act. He now claims that he was denied his rights to procedural due process because on the second "appeal" of his case to the appeal board no hearing was conducted by the Department of Justice as required in the cases of appeals by registrants professing conscientious objection to military training and service.

An examination of Davidson's file reveals the following:

In his classification questionnaire filed with his local board in Los Angeles County, California, he qualified his claim of conscientious objection to war with the following statement:

> "It will be noted that I have signed series XIV.
>
> "I would like to make my position clear. I do conscientiously object to war and to conscription for any reason. But, my beliefs are not religious, they are basicly political. As a political objector I shall resist this totalitarian move by my own country as I would resist it in any other country. My position is briefly stated in the attached newspaper article by myself. If after considering these facts the board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it out and return it to the board with the understanding that my objections are not religious but political." (So in the originial.)

In the special form for conscientious objector, Davidson did not sign his name in the appropriate place for claiming exemption, but instead made a notation "Statement attached," and in answer to the question whether he believed in a Supreme Being, his answer was "No." Also, in answer to the question as to whether he was a member of a religious sect or organization, his answer was in the negative. Thereafter, by unanimous vote, he was classified I-A, and notice of the classification was mailed to him on July 13, 1950. Twelve days after receipt of this notice by Davidson,

the local board received a letter from him in which he restated his views and requested an appeal of his classification. Nowhere in that letter, or in his file, is it stated that he was a registrant claiming by reason of religious training and belief to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces. The local board, however, honored his request and forwarded his file to the appeal board. Davidson's case was referred to the Department of Justice, which, after an investigation and hearing, wrote the appeal board, recommending that Davidson be not classified as a conscientious objector. By unanimous vote, the appeal board placed him in Class I-A, and notice of such classification was mailed to the registrant.

An order to report for induction, dated February 19, 1951, was mailed to Davidson, but induction was postponed until June 15, 1951, because he was a student. On September 7, 1951, Davidson was notified that as the reasons for his postponement no longer existed, he was ordered to report for induction on September 18, 1951. By letter dated September 8, 1951, received by his local board two days later, the board was advised as follows:

> "This letter was intended to appeal my classification as 1A, but since before the ten days for appeal had ellapsed I have received an induction notice, I will address my appeal to the induction notice. (So in the original.)

> "This then is a formal appeal for a postponement from the notice to appear for induction at 8 A.M. the 18th of September 1951."

The local board apparently treated Davidson's last letter as a claim for appeal under 32 C.F.R. §1626.25, his file was sent to the appeal board, and thence to the United States Attorney for the purpose of securing an advisory recommendation from the Department of Justice. His induction was postponed until further notice. On the second "appeal," no hearing was conducted by the Department of Justice, but that Department again recommended to the appeal board that he be not classified as a conscientious objector. The appeal board repeated its former action, as did the local board, and a new order to report for induction, dated October 1, 1952, was sent to the registrant, ordering him to report for induction on October 17, 1952. The indictment and conviction resulted from his refusal to be inducted into the armed forces under the foregoing order.

Davidson conceded that he had no complaint to make in connection with the first appeal, but claims that his denial of due process arose out of the proceedings after the last postponement of his induction, dated September 15, 1951.

A careful examination of Davidson's file fails to reveal that at any time from the date of his registration he claimed by reason of religious training and belief that he was conscientiously opposed to participation in war in any form and by virtue thereof that he conscientiously opposed combatant training and service in the

armed forces. He does not believe in a Supreme Being, nor is he a member of a religious organization. His objections to war are best stated in his own words:

> ". . . my beliefs are not religious, they are basicly political. As a political objector I shall resist this totalitarian move by my own country as I would resist it in any other country." (So in the original.)

and

> "I am not a member, or would I be considered a follower of any religion or religious sect. I do not believe in the existence of a supreme being. My allegiance is not to any god or any country, it is to humanity as a whole. . . .
>
> "This cannot be classified, then, as religious objection to war. If my objections are criminal because they are based on rationality instead of superstition, then it must be so, . . . My references are not to substantiate any religious beliefs but rather my humanitarian and philosophical views." (So in the original.)

Whether or not the local board, on the basis of the evidence before it, was justified in honoring Davidson's appeal in 1950 is presently of no moment except to say that after full compliance with the special provisions involving claims that he was a conscientious objector, it was determined that his claim was without merit. He was originally classified as I-A, and that classification has never been changed. While it may be true that the provisions for appeal in the Selective Service System should be liberally construed so as not to deny to a registrant the right to have his bona fide claims care-

fully considered, still the regulations should not be construed to give such registrant rights which were non-existent. The only efforts to seek a change of classification which we need to consider are contained in his requests for appeal made to the local board, and significantly the last request was not for a change in classification, which Davidson admitted came too late, but was "a formal appeal for a postponement from the notice to appear for induction . . . " Nowhere in the regulations is there a provision for appeal by a registrant for postponement of an order to report for induction. To the contrary, it appears in 32 C.F.R. §1626.2 (d) that appeals from any classification of a registrant must be filed prior to the date the local board mails to the registrant an order to report for induction.

Query: Does the local board's error in going through the procedure of granting to Davidson an abortive appeal give him the rights to procedural due process, the denial of which he now complains? The answer is "No."

The record here discloses that after the registrant's appeal in 1950, no additional evidence was brought to the attention of the local board which would in any way affect his classification as I-A. The record reveals only that there was a postponement of his induction for the purpose of continuing his studies, and this postponement was cut short because of his failure to satisfactorily pursue his course of instruction as a fourth-year university student majoring in political science. The record submitted to the appeal board contained nothing new which could affect its prior deci-

sion. An alert hearing officer first saw the mistake and advised Davidson that he was not entitled to a second hearing because he had already had one. The Department of Justice notified the appeal board that there was no new evidence which altered its previous recommendation thta the registrant's conscientious objector claim be not sustained. We are of the view that this conclusion was correct and it was not incumbent upon the Department to grant Davidson a hearing on this second occasion of his appearing before the hearing officer.

> "The statute does entitle the registrant to a 'hearing,' and of course no sham substitute will meet this requirement; but we do not think that the word 'hearing'—when put in the context of the whole scheme for review set forth in §6(j)—comprehends the formal and litigious procedures which respondents' interpretation would attribute to it. Instead, the word takes its meaning in this instance from an analysis of the precise function which Congress has imposed upon the Department of Justice in §6(j)." *United States v. Nugent*, 346 U.S. 1, 7-8.

Nor does the word "appeal" as used in §6(j) of the Selective Service Act of 1948 (Title 50, App. 546(j)) comprehend the legal niceties which this registrant urges. To require appeal boards and the Department of Justice to consider and reconsider cases of this nature at the whim of the registrants would unecessarily tend to confuse the appellate procedures and would be

violative of the system set forth with preciseness in §6(j).

Appellant has urged other contentions in connection with his trial. We have examined them with care and find them to be without merit.

We find no error in the record and the judgment is affirmed.

(Endorsed:) Opinion. Filed Dec. 27, 1954.
Paul P. O'Brien, Clerk.

APPENDIX B

[TITLE OF COURT AND CAUSE]

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: December 27, 1954,

PAUL P. O'BRIEN, Clerk.

APPENDIX C

[TITLE OF COURT AND CAUSE]

Except from Proceedings of Friday, February 11, 1955.
Before: MATHEWS and ORR, Circuit Judges, and WIIG, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant, filed January 26, 1954, and within time allowed therefor by rule of Court for a rehearing of above cause, and hereby is denied.

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

VIth Article (3rd Clause) of the Constitution

" . . . ; but no religious test shall ever be required as a qualification to any officer or public trust under the United States."

1st Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assembly, and to petition the Government for a redress of grievances."

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Act.

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) §451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—

June 24, 1948, ch. 625, title I, §1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, §1(a) 65 Stat. 75.

Section 6(j) of the Act

Section 6(j) of the act (50 U.S.C. App. (Supp. V) §456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section

12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections

are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be found to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. (Supp. V) §456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the Act

Section 12(a) of the act (50 U.S.C. App. (Supp. B) §462(a)) provides:

" . . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

Section 1604.41 of the selective service regulations, at all times has been:

ADVISORS TO REGISTRANTS

1604.41 APPOINTMENT and DUTIES.—Advisors to registrants shall be appointed by the Director of Selective Service upon recommenda-

tion of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the Selective Service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

GOVERNMENT APPEAL AGENTS

1604.71 APPOINTMENT AND DUTIES.—(a) For each local board a government appeal agent shall be appointed by the President upon recommendation of the Governor.

(b) One or more associate government appeal agents may be appointed by the President for each local board when either the government appeal agent appointed for that board or the local board requests such assistance and the Governor, being of the opinion that the circumstances warrant such action, recommends appointment. Whenever an intercounty local board is established an associate government appeal agent shall be appointed by the President, upon recommendation of the Governor, for each county included within the local board area.

(c) Each government appeal agent and associate government appeal agent shall, whenever possible, be a person with legal training and experience and shall not be a member of the armed forces or any reserve component thereof.

(d) It shall be the duty of the government appeal agent and in his absence or inability to act or at his direction, the duty of the associate government appeal agent:

(1) To expeditiously examine the records of registrants who have been classified by the local board in order that appeals to the appeal board, when found necessary, may be filed within the time limit specified by the regulations, and to appeal, as prescribed by the regulations, from any classification by a local board which, in his opinion, should be reviewed by the appeal board.

(2) To attend such local board meetings as the local board may request him to attend.

(3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered.

(4) To render such assistance to the local board as it may request by advising the members and interpreting for them laws, regulations, and other directives.

(5) To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.

Section 1622.11 Class I-A-O

Section 1622.11 Class I-A-O, provides:

"*Conscientious Objector Available for Noncombatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

Section 1622.14 of the Regulations

Section 1622.14 of the Selective Service Regulations (32 C. F. R. §1622.14 (1951 Rev.)) provides:

"*Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. §1626.25 (1951 Rev.)) provides:

"*Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by

virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that case.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant

is eligible for classification in Class I-O, it shall place him in that case.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the

registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be found to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Regulations

Section 1626.26 of the Selective Service Regulations (32 C. F. R. §1626.26 (1951 Rev.)) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified

for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that it shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 644

VERN GEORGE DAVIDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 105–110; Pet. App. 1–8) is reported at 218 F. 2d 609. The opinion of the district court (R. 6–14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1954, and a petition for rehearing was denied on February 11, 1955 (R. 111, 112, Pet. App. B and C). The petition for a writ of certiorari was filed on March 9, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether failure to give a Selective Service registrant a copy of the Department of Justice recommendation prior to action by the appeal board is a denial of due process where the report was available to him prior to a second appeal which resulted in the classification pursuant to which he was ordered to report for induction.

2. Whether a Selective Service registrant is entitled to a second hearing before a Department of Justice hearing officer on a second appeal from his classification, there being no new material in his file.

3. Whether the failure of the local board to appoint local advisers and post their names in the local office as provided by the regulations is a denial of due process where registrars are available to assist registrants and an appeal agent has been appointed and is available to registrants.

4. Whether Section 6 (j) of the Universal Military Training and Service Act, which provides an exemption from military service for persons conscientiously opposed to participation in war "by reason of religious training and belief" is constitutional.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The pertinent portions of the United States Constitution, the Universal Military Training and Service Act, and the Regulations issued there-

under, are set forth in the Appendix, infra, pp. 16–20.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California for refusal to obey an order for induction into the armed forces of the United States. He was sentenced to three years' imprisonment. (R. 3–4, 15.) On appeal (R. 16–17), the judgment was unanimously affirmed (R. 111).

Pertinent facts from petitioner's selective service file, which was introduced in evidence as Government Exhibit 1 (R. 5, 18), are as follows:

In his classification questionnaire filed on October 7, 1948, with Local Board No. 89 of Los Angeles County, petitioner stated that he was a pre-legal student at the University of California at Los Angeles (F. 4, 9).[1] He refused to answer the question as to his race on the ground that that was his "own business" (F. 10). He attached a statement to the questionnaire which read in pertinent part (F. 11):

> It will be noted that I have signed series XIV.
>
> I would like to make my position clear. I do conscientiously object to war and to conscription for any reason. But, my beliefs are not religious, they are basically political. As a political objector I shall

[1] "F." refers to the longhand numbers at the bottom of the pages in Government Exhibit 1.

> resist this totalitarian move by my own country as I would resist it in any other country. My position is briefly stated in the attached newspaper article by myself.

In the article referred to, petitioner stated that the underlying problem of war was the inadequacy of capitalism, the answer to which was democratic socialism; that he disclaimed any religious justification for his beliefs; and that his answer to conscription must be expressed in civil disobedience (F. 11, 12).

In his SSS Form No. 150 for conscientious objectors, filed on February 27, 1950, petitioner stated that he did not believe in a Supreme Being; that his beliefs arose out of a "long education of socialist ideas"; and that he was not a member of a religious sect (F. 20, 21, 23). Petitioner did not sign his name to this form at the appropriate place to claim exemption but instead wrote, "Statement Attached" (F. 20). In this statement expounding on the futility of war the following appears (F. 22):

> I am not a member, or would be considered a follower of any religion or religious sect. I do not believe in the existence of a supreme being. My allegiance is not to any God or any country, it is to humanity as a whole.
>
> * * * * *
>
> This can not be classified, then, as religious objection to war. If my objections

> are criminal because they are based on rationality instead of superstition, then it must be so, but I will object and I will refuse to do military service. * * *

On July 12, 1950, petitioner, by a 3 to 0 vote of the local board, was classified I–A and a Form 110 notice of classification was mailed to him the next day (F. 16). In a letter to the local board dated July 24, 1950, petitioner stated he was appealing his I–A classification and that as a socialist he would refuse induction into the armed forces (F. 27–28).

Petitioner was ordered to report for a physical examination on August 8, 1950 (F. 29). He was found acceptable, and on August 11, 1950, NME Form 62 (Certificate of Acceptability) was mailed to him (F. 16).

Petitioner's file was ordered sent to the appeal board, which on September 12, 1950, determined petitioner was not entitled to classification in either a class lower than in IV–E or in IV–E (F. 16, 31, 32). After petitioner's file had been forwarded to the Department of Justice, petitioner was granted a hearing at Los Angeles, California, on November 14, 1950 (F. 32, 37). The hearing officer's report stated that petitioner was a "lone wolf" with a "chip on his shoulder"; that those interviewed by the F. B. I. said that religion played no part in petitioner's beliefs; that some believed petitioner's mind worked along "communistic lines"; that according to an informant

petitioner stated that "if Russia invades [he] would not defend [his] country but would feed them"; that petitioner stated he was "not concerned about killing or about violence"; and that he told the hearing officer that his beliefs were not related to "religion or his early training." The hearing officer recommended against any conscientious objector classification. (F. 37–41.) The Department of Justice concurred in the recommendation of the hearing officer whose report it enclosed, on the ground that petitioner failed to prove that his objections were "based upon deep-seated conscientious convictions arising out of religious training and belief" (F. 35). On February 13, 1951, the appeal board classified petitioner I–A by a 5 to 0 vote (F. 16).

An order to report for induction, dated February 19, 1951, was mailed to petitioner, but his induction was postponed until June 15, 1951, since he was a student (F. 16, 43–47). On August 29, 1951, petitioner was classified I–A and a second Form 110 notice of classification was mailed to him (F. 16). On September 7, 1951, petitioner was notified that since the reasons for postponement no longer existed, he was ordered to report for induction on September 18, 1951 (F. 16, 52).

In a letter received by the local board on September 10, 1951, petitioner stated (F. 16, 53):

> This letter was intended to appeal my classification as 1–A, but since before the ten days for appeal had ellapsed [sic] I

> have received an induction notice, I will address my appeal to the induction notice.
>
> This then is a formal appeal for a postponement from the notice to appear for induction at 8 A. M. the 18th of September 1951.

On September 12, 1951, the local board, apparently considering petitioner's last letter as a claim for appeal under 32 C. F. R. 1626.25, sent his file to the appeal board (F. 16). On September 13, 1951, the local board postponed petitioner's induction until further notice pending appeal (F. 16, 55–56). On October 24, 1951, the appeal board reviewed petitioner's file and determined that he should not be classified either I–A–O or I–O (F. 16), and on November 6, 1951, forwarded the file to the United States Attorney for the purpose of securing an advisory recommendation from the Department of Justice (F. 58).

On this second appeal, no hearing was conducted by the Department of Justice. In a letter of July 29, 1952, the Department again recommended to the appeal board that petitioner should not be classified as a conscientious objector. After referring to the earlier hearing on December 14, 1950, the Department stated that petitioner's objections to war were political and philosophical, not based upon religious training and belief; and that after a review of the entire file and record there was no new evidence to alter

the previous findings and conclusions of the Department. (F. 64–65.)

The appeal board on August 19, 1952, again classified petitioner I–A by a 4 to 0 vote, and a Form 110 notice of classification was mailed to petitioner (F. 16). A new order to report for induction on October 17, 1952, was sent to petitioner (F. 18, 69). On that date petitioner signed a statement refusing induction into the armed forces (F. 18, 72–76).

At the trial, petitioner testified that on December 10, 1950, he wrote a letter (Defendant's Exhibit A) to the hearing examiner asking to be "advised of the general nature and character of any evidence in your possession which is unfavorable to, and tends to defeat my claim for a conscientious objector status." At the hearing, the hearing officer said that there did not seem to be any adverse information except that some people thought petitioner might be a Communist while others did not think so. (R. 50–51, 63.) Petitioner did not receive a copy of the hearing officer's report or the Department of Justice recommendation to the appeal board (R. 51).

According to petitioner some of the statements in the hearing officer's report were incorrect (R. 68). Petitioner denied making the statement that he would feed the Russians in the event of an invasion, and challenged the statement that he was

not concerned with killing (R. 69). Petitioner admitted stating in the selective service proceedings that his beliefs were basically political, not religious, and that he disclaimed religious justification for his beliefs since he had no formal religion (R. 69–70).

It was stipulated that there was no second hearing before a hearing officer in connection with petitioner's second appeal (R. 83–86). The hearing officer in New York, to whom petitioner's file was referred, informed petitioner, when the latter appeared for a hearing, that there had been a mistake in notifying petitioner to appear, since petitioner had already had a hearing (R. 51–52).

The court rejected offers to prove by petitioner's testimony that he really believed in a Supreme Being and that the beliefs he stated in the selective service proceedings were religious even though he termed them political (R. 64–67). It also rejected an offer of proof by two ministers that their study of petitioner's file showed that his beliefs were really religious even though he had termed them political (R. 33, 35–37, 39).

ARGUMENT

1. Petitioner contends that after the first hearing before a hearing officer on his conscientious objector claim he was entitled to be furnished a copy of the unfavorable recommendation of the Department of Justice so that he might answer it

prior to the appeal board's decision (Pet. 4, 13–14). We may assume that if only the first appeal were involved, petitioner would have been entitled to reversal on such ground under the ruling of *Gonzales* v. *United States*, No. 69, O. T. 1954, decided March 14, 1955, even though his own disclaimer of religious belief in asserting his claim so completely established the absence of any right to a conscientious objector classification that it is difficult to see how any statements in the hearing officer's report could have affected his ultimate classification.[2] The allowance of the second appeal is, however, a significant feature which seems to us to remove petitioner's case from the scope of *Gonzales*. During the period from the date of the I–A classification by the appeal board on the first appeal on February 13, 1951, until the de-

[2] Since petitioner did not even present a claim that he was conscientiously opposed to participation in war in any form "by reason of religious training and belief" as required by Section 6 (j) and specifically disclaimed belief in a Supreme Being which is required by the statute to constitute religious training and belief, it is questionable whether he had any right at all to the hearing prescribed by that section for persons claiming "such conscientious objections" whose claim is not sustained by the local board. In any event, the Department's recommendation was so clearly based on the admitted disclaimer of religious basis that other statements in the hearing officer's report have no real relevancy. Thus there is no merit in the contention that the trial court erred in refusing to admit in evidence a copy of the F. B. I. report used by the hearing officer (Pet. 4, 13). This point was not decided in *Simmons* v. *United States*, No. 251, O. T. 1954, but is discussed in the government brief in that case at pp. 39–49.

cision on the second appeal on August 19, 1952 (F. 16), petitioner had ample time to examine his file and to study the Department of Justice's recommendation on the first appeal. Under 32 C. F. R. 1626.25 (d), as it read during the period here relevant, the appeal board was required to place in the cover sheet of his file both the letter containing the recommendation of the Department of Justice and the hearing officer's report. The record shows that this was done (see R. 10–11). Under 32 C. F. R. 1606.32 (a) (1) and 1606.38 this information was available to petitioner.[3] Under 32 C. F. R. 1626.12 petitioner, upon taking his second appeal, could have attached a statement disclosing whatever answer he had to the Department of Justice recommendation adverse to his conscientious objector claim. Such a statement would have been considered by the appeal board before ruling on the second appeal.

It may be, as both courts below held (Pet. App. 6–8, R. 13–14), that in giving petitioner a second appeal even though he presented no new grounds, the Selective Service Boards were giving petitioner more than was his due. But the fact remains that he was given such second appeal and that the appeal board classified him anew

[3] See also letter of February 4, 1955, from Lewis B. Hershey, Director of Selective Service, to Solicitor General Sobeloff with respect to a registrant's right to examine his selective service file and to request a reopening of his classification. This letter was filed with the Court in *Gonzales v. United States*, No. 69, O. T. 1954.

on that second appeal. The rationale of *Gonzales* appears to us to be that a registrant should have a reasonable opportunity to answer an unfavorable Department of Justice recommendation against his conscientious objector claim before the appeal board makes its decision. Here, petitioner had such an opportunity before the decision of the appeal board on the second appeal which resulted in the classification pursuant to which he was ordered to report for induction.

2. Petitioner contends that he was entitled to a second hearing before a Department of Justice hearing officer notwithstanding the fact that he had offered no new evidence bearing on his eligibility for a conscientious-objector classification (Pet. 3, 11–13). We think this contention is without merit. As the court below observed, "The record submitted to the appeal board contained nothing new which could affect its prior decision" (Pet. App. 6–7). Under the circumstances, the Department of Justice was warranted in notifying the appeal board that there was no new evidence which altered its previous recommendation that petitioner's conscientious-objector claim be not sustained (see Pet. App. 7). It is further material, as noted above, that in granting petitioner a second appeal the Selective Service system awarded petitioner more than was his due.

3. Petitioner contends that he was denied due process of law by reason of the failure to have

local advisers with their names posted in the local board office in accordance with 32 C. F. R. 1604.41 (Pet. 5, 14–15). The evidence showed that while the local board did not have advisers, technically speaking, and thus did not have their names posted (R. 42, 44, 45), there were numerous so-called registrars in the county who performed the same duties as advisers. At 18 West Main Street in Alhambra within the jurisdiction of the local board there were ten or twelve compensated employees who advised registrants (R. 41, 42, 43). There would have been no magic in designation of the officials as advisers instead of registrars so long as they were available to advise registrants.

Although petitioner stated that he visited his local board a number of times, he admitted that he had not sought advice or asked where he could get advice (R. 63). Moreover, he was informed of his right to appeal by the notice on classification Form 110, which was sent to petitioner prior to each appeal (F. 16), and which advised registrants to "See your Government Appeal Agent" (R. 46). The record here shows that an appeal agent had been appointed and was available to registrants (R. 46–48). Under these circumstances, two district courts have held that the failure of the local board to appoint an advisory panel and post their names did not vitiate the proceedings. *United States* v. *Dorn,* 121 F. Supp. 171, 178–179 (E. D. Wisc.); *United States* v.

Sutter, 127 F. Supp. 109, 119 (S. D. Cal.). But see *Chernekoff* v. *United States* (C. A. 9, Feb. 24, 1955). Finally, it should be noted that petitioner in fact had no difficulty in prosecuting two appeals from the local board's classifications.

Petitioner intimates that if there had been advisors they would have assured him that his objections to war were actually based upon religious considerations even though he unequivocally termed them political, and that he really believed in a Supreme Being although he denied this. It is manifest, however, that no one could have told petitioner that he believed in God when he himself insisted he did not.

4. Petitioner argues that Section 6 (j) of the Act violates Article VI, Clause 3 of the Constitution and the First Amendment, since it discriminates against religions not founded on belief in a Supreme Being (Pet. 5, 15). It is clear, however, that the statute does not violate either of these constitutional provisions. It does not require a religious test as qualification for a public office; neither is it a law establishing a religion or prohibiting its free exercise.

The privilege of a conscientious objector to be exempt from bearing arms comes, not from the Constitution, but from Congress, which may grant or withhold exemption as it sees fit. Cf. *United States* v. *MacIntosh*, 283 U. S. 605, 623–624. It cannot be said that there was no reasonable basis for Congress to make a distinction

between those conscientious objectors whose beliefs have their genesis in religious training and the concept of a Supreme Being, and those having essentially political, sociological, or philosophical views. Legislative classifications must be reasonable, but it is not required that they result in perfect equality. Cf. *George* v. *United States*, 196 F. 2d 445, 450–452 (C. A. 9), certiorari denied, 344 U. S. 843. The statute did not interfere with any religion or lack of religion petitioner might chose. It merely failed to grant him a privilege on the basis of a distinction which has been traditional in American history.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1955.

APPENDIX

Constitution of the United States:

Article VI, Clause 3:

> * * *; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to

participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after

such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Regulations of the Selective Service System:

32 C. F. R. 1604.41:

Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

32 C. F. R. 1606.32:

(a) Information contained in records in a registrant's file may be disclosed or furnished to, or examined by, the following persons, namely:

(1) The registrant, * * *

32 C. F. R. 1606.38:

When used in this part, the following words with regard to the records of, or information as to, any registrant shall have the meaning ascribed to them as follows:

(a) "Disclose" shall mean a verbal or written statement concerning any such record or information.

(b) "Furnish" shall mean providing in substance or verbatim a copy of any such record or information.

(c) "Examine" shall mean a visual inspection and examination of any such record or information at the office of the local board or appeal board as the case may be.

32 C. F. R. 1626.25, Sept. 28, 1951:

* * * * *

(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.[1]

[1] In a revision dated June 18, 1952, the above regulation became 32 C. F. R. 1626.25 (c), omitting the phrase "and the report of the Hearing Officer of the Department of Justice."

32 C. F. R. 1626.12:

The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

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